IN THE

Supreme Court of the United States

No. 36. October Term, 1944.

MICHAEL F. McDONALD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Reply Brief for Petitioner.

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

In the first section of Respondent's argument, he suggests that Petitioner, by relying on the fact that he was already in office, seeks to draw an untenable distinction between his case and those of candidates seeking office for the first time.

This suggestion misconstrues Petitioner's argument. Petitioner was obliged to base his argument upon the facts of his particular case, namely, that he was in public office in 1939, and that, in order to continue in that office for the ensuing full term of ten years, he was obliged by the State law to run for election. Petitioner does not argue that the deductibility of election expenses should not apply to those seeking office for the first time. If such a distinction would be indefensible, it need not be made.

The Respondent further argues that the determination of what constitutes "ordinary and necessary" campaign expenses, if held deductible, would pose a question for the Commissioner without satisfactory guidance to its solution.

But the answer to any such argument is that the "ordinary and necessary" business expense provision contained in Section 23 (a) (1) (A) of the Internal Revenue Code has posed countless questions for the Commissioner to solve in its application to private business; yet with the assistance of his expert staff of Revenue Agents located throughout the country, the Commissioner has been well able to solve these questions and will continue to do so. The same is true of Section 23 (a) (2) of the Code relative to non-trade or non-business expenses, and of Section 23 (e) regarding losses. Under all these sections, countless problems have been posed and the Commissioner has had them solved in the manner prescribed by law.[1] Furthermore, this Court has not hesitated to construe tax statutes in the manner which best served their ultimate purposes, regardless of the possibility of subsequent administrative adjustments or even litigation.[2] And while the election legislation of some states may give less detailed guidance than the Pennsylvania statute, there is, nevertheless, a substantial body of legislation in the various states to regulate such expenditures; and in 1937 no less than thirty-eight states limited the amounts which candidates could spend for campaign purposes.[2] Is it any more unreasonable for the Commissioner to be guided by state regulation and limitation of such expenses in determining their deductibility than it is for him to determine the deductibility from a taxable estate of the counsel fees, executor's commissions, and other charges allowed by the state law having jurisdiction thereof? In fact, with this body of state legislation as a guide, with the statutory limits and the full reports of expenditures required in most states for examples, the Commissioner may find himself in an even better position than he was when he first began determining which ex-

[1] For example, in *Helvering v. Hallock*, 309 U. S. 106, and in *Helvering v. Clifford*, 309 U. S. 331.

[2] See the legislation referred to in Respondent's Brief, page 10, footnote 6.

penses of a private business were "ordinary and necessary."

The Respondent further argues that to allow these deductions would be to embroil him in political controversy. But the returns of candidates and officeholders must be audited in any event, and must already in numerous instances include matters which could be the subject of political controversy. Yet the Commissioner, through competent administration, is auditing thousands of them without difficulty.

II.

Respondent argues that Petitioner has failed to sustain the burden of establishing his right to the deduction which he claims. But what further burden can rest on the Petitioner? Petitioner has shown in his main brief that the *unambiguous provisions* of Section 23 (a) (1) (A), dealing with trade or business expenses, of Section 23 (a) (2) dealing with non-trade or non-business expenses, and of Section 23 (e) dealing with losses by individuals, entitle him to deduct the campaign expenses incurred by him in 1939.

(a) With regard to the deductibility of the expenses as ordinary and necessary business expenses, Respondent further argues at page 5 that the expenses in issue "* * * are analogous to expenditures made by an individual in order to equip himself for a trade or profession, which uniformly have been held to be non-deductible." Petitioner's main brief, pages 20-22, clearly shows the distinction between expenditures made "to equip a person for a trade or profession", and those made to obtain a specific position in a trade or profession already being followed. As to the latter expenses, they have uniformly been held to be deductible. Petitioner did not incur the expenses in issue "to equip himself for a trade or profession." Petitioner was already equipped by his legal training to accept his judicial appointment. By the time of the expenses in

issue, he also had had a year's experience as judge. Are not his election expenses much more analogous to the training expenses of an actor to keep in condition; or a movie actress' expenses in sending her mother to seek employment for her abroad; or to Labor Union dues and initiation fees? All these have been allowed as deductions, and are clearly unlike those incurred by a student at Law School, equipping himself to become that which the Petitioner already was—a lawyer and judge.

Respondent further argues, at page 5, that "The nondeductibility of campaign expenses is confirmed by an administrative construction of the statutory provisions involved which has obtained for nearly a quarter of a century. There is abundant evidence of congressional acquiescence in that construction."

Respondent points to no statutory provision, and to no Regulation promulgated by the Commissioner and approved by the Secretary of the Treasury, holding that a candidate's election campaign expenses are not deductible (except Treasury Decision 5196, promulgated three months after the hearing in the instant case before the Tax Court and then only under the new provision, Section 23 (a) (2), dealing with non-trade and non-business expenses). Whatever other rulings of the bureau there may be, such as O. D.'s, I. T.'s, etc., other than Treasury Decisions, these are of no effect here, as this Court held in *Helvering v. New York Trust Company*, 292 U. S. 455-468 (1934).

> "The rulings, * * * cited by the Commissioner * * * 'have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law.' See cautionary notice published in the bulletins containing these rulings."

See also *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938), wherein Justice (now Chief Justice) Stone, said—

> "Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, * * *"

citing *Helvering v. New York Trust Co.*, supra. And the two decisions of this Court on which Respondent relies, *White v. Winchester Club*, 315 U. S. 32, and *Helvering v. Griffiths*, 318 U. S. 371, both clearly dealt with subjects where the Treasury's position had been made clear from the beginning in Regulations, approved by the Secretary. Such tentative interpretations as O. D.'s do not gather authority with age: even the venerable O. D. 864, announced in 1921, and quoted in the Appendix to Respondent's Brief, has been disregarded, so far as it holds that a Congressman may not deduct his living expenses in Washington, by the recent decisions of the Second and Ninth Circuit Courts of Appeals, in *Coburn v. Commissioner*, 138 F. 2d 763 (Nov. 29, 1943), and in *Wallace v. Commissioner*, ___ F. 2d ___ (July 17, 1944), 1944 Prentice-Hall Federal Tax Service, para. 62,705, which held that an actor who maintains a domicile in New York or San Francisco may deduct living expenses incurred while working for extended periods of time in Hollywood.[3]

(b) With regard to the deductibility of the expenses in issue as "non-business" expenses, Respondent's argument is that the 1942 amendments did not create "a vague new category of deductible expenditures." But a special category of expenses exists; it includes expenditures which are not "business" and yet are not "personal;" and, as Respondent states, at page 33 of his Brief, it was to render this category of expenses deductible that the 1942 Amendment was passed.[4] The *VanWart* and *Higgins* decisions may have crystallized the desire for the Amendment, but nowhere in the Committee reports or in the language of the amendment is there any limitation solely to in-

[3] In both the *Coburn* and the *Wallace* cases, the Solicitor General determined not to file petitions for certiorari in this Court.

[4] *Cf.* Hearings before Ways and Means Committee on 1942 Revenue Revision, 77th Cong., 2d Sess., Vol. 5, p. 2802.

vestors' expenses. If it is indefensible to distinguish between candidates already in office and those seeking office, can it be imagined that Congress in adopting the plain language of the amendment, intended to favor investors, as against those persons incurring "ordinary and necessary" expenses for the production of income from gainful employment?

If the process of running for elective office is to be treated differently from performing the functions of the office, and if, as Respondent says (at page 16 of his Brief), "campaigning for nomination or election to public office does not constitute the carrying on of any trade or business," then the expenses in issue, which were certainly undertaken to produce income, are in the third category, and therefore are deductible under the 1942 Amendment.

(c) With regard to the allowance of the expenditures as a loss, Respondent argues that this would permit campaign expenses to be deducted by a losing candidate but not by one who was successful. But if this distinction is considered unfair, it would be entirely consistent with established principles of the tax law to permit the successful candidate to capitalize his expenditures and to amortize them by claiming a proportionate deduction in each ensuing year of his term of office. Compare the deduction of a lessee's improvements over the term of the lease, Reg. 103, Sec. 19.23 (a)-10.

On page 28, of the Respondent's brief, he states—

> "In the present case the taxpayer defrayed part of his campaign expenses from money contributed to him for that purpose (R. 30a). Although he sought to deduct the entire amount of the campaign expenses, he did not return the money contributed as income (R. 105a, 29a). Consistently with his determination that the campaign expenses were deductible, the commissioner has not asserted that the money contributed was income (R. 8a-9a)."

This money referred to by Respondent was $500 contributed to Petitioner by his son. Section 22 (b) of the Internal Revenue Code provides that gifts shall not be included in gross income. Normally, amounts paid over by one member of the family to another member thereof, without consideration, would be considered as a gift and therefore excluded from the recipient's income. The Commissioner has ruled, I. T. 3276, 1939-1 Cum. Bull., 108, that such campaign contributions are gifts and not income. (See page 17 of Respondent's Brief, footnote 19.) However, where the money is paid over for a specific purpose, such as in the instant case by the son to his father to defray in part the campaign expenses incurred by his father, it might not be considered to be a gift; but it most assuredly would not be income, being rather applied, if at all, in reduction of the father's expenses. It thus may well be that the amount claimed as a deduction by Petitioner should be reduced by $500 if this Court considers that the amount paid by the son to the father is not a gift.

Wherefore, it is respectfully submitted that the contentions of Petitioner's principal Brief should be sustained.

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